IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-30682

WILLIAM ALEXANDER ANDERSON
d/b/a LAWNLORDS

Debtor

MEMORANDUM ON MOTION FOR RELIEF FROM AUTOMATIC STAY OR IN THE ALTERNATIVE, MOTION FOR ADEQUATE PROTECTION

APPEARANCES: RITCHIE HURLEY, P.C.
Wilson S. Ritchie, Esq.
1501 First Tennessee Plaza
800 South Gay Street
Knoxville, Tennessee 37929
Attorneys for Branch Banking and Trust Company

EGERTON, McAFEE, ARMISTEAD & DAVIS, P.C.
William W. Davis, Jr., Esq.
1400 Riverview Tower
900 South Gay Street
Knoxville, Tennessee 37902
Attorneys for Debtor

RICHARD F. CLIPPARD, ESQ.
UNITED STATES TRUSTEE
Patricia C. Foster, Esq.
800 Market Street
Suite 114
Knoxville, Tennessee 37902
Attorneys for United States Trustee

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This matter is before the court upon the Objection to Confirmation of Chapter 13 Plan[,] Motion for Relief from Automatic Stay or in the Alternative, Motion for Adequate Protection and Motion to Dismiss (Motion for Relief) filed by Branch Banking and Trust Company (BB&T) on April 30, 2003.[1] The court set an evidentiary hearing on BB&T's request for relief from the automatic stay and/or adequate protection and ordered the parties to brief their respective theories by May 27, 2003.

The evidentiary hearing on BB&T's Motion for Relief was held on July 7, 2003. The record before the court consists of nine stipulated and three additional exhibits introduced into evidence and the testimony of three witnesses, Robbie Franklin, Mitchell Noble, and the Debtor.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(G) (West 1993).

I

On February 11, 2003, the Debtor filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code, which was converted to a case under Chapter 11 on June 30, 2003. The Debtor operates a landscaping business known as LawnLords, which provides lawn mowing and servicing for his customers. His primary income is through a contract with the State of Tennessee to mow and service the lawn at Lakeshore Mental Facility in Knoxville, Tennessee, but he also has smaller contracts with apartment complexes and various other businesses and individuals.

[1] On May 15, 2003, the court entered an Order sustaining objections to confirmation filed by BB&T and the Chapter 13 Trustee and directing the Debtor to either convert or dismiss the case by May 28, 2003. The Debtor filed a motion to convert to Chapter 11 on May 20, 2003, and on June 30, 2003, an Order was entered granting the motion and converting the case to Chapter 11. Only the automatic stay and adequate protection issues raised by BB&T's Motion for Relief remain unresolved.

BB&T is a secured creditor by virtue of four promissory notes executed by the Debtor in favor of BB&T,[2] secured by the following collateral: (1) a promissory note dated April 21, 2000, in the principal amount of $125,350.00, secured by 100 shares of First American Corporation stock, all equipment utilized by the Debtor in the operation of his business, and real property located at 1608 and 1610 Topside Road, Louisville, Tennessee (the Topside Road Real Property); (2) a promissory note dated May 16, 2000, in the principal amount of $25,100.00, secured by a 1995 Ford F150 truck; (3) a promissory note dated June 24, 2000, in the principal amount of $65,404.92, secured by the Topside Road Real Property; and (4) a promissory note dated August 16, 2001, in the principal amount of $38,000.00, secured by the Topside Road Real Property and a second lien on a John Deere 4-wheel drive tractor and two John Deere mowers[3] (collectively the Collateral). The parties stipulated that the aggregate outstanding balance owed to BB&T by the Debtor pursuant to the four promissory notes, as of the date his bankruptcy petition was filed, is $279,855.13. The Debtor has not made any payments to BB&T since before August 2002, and he is in default on the promissory notes.

II

BB&T's Motion for Relief is governed by 11 U.S.C.A. § 362(d) (West 1993 & Supp. 2003), which provides in pertinent part:

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[2] The majority of these documents are between the Debtor and BankFirst, for whom BB&T is the successor in interest.

[3] John Deere Credit is the holder of the first lien on the John Deere mowers and tractor by virtue of a Purchase Money Security Agreement with an outstanding balance of approximately $61,000.00.

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
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> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; [or]
> >
> > (2) with respect to a stay of an act against property under subsection (a) of this section, if—
> >
> > > (A) the debtor does not have an equity in such property; and
> > >
> > > (B) such property is not necessary to an effective reorganization[.]

11 U.S.C.A. § 362(d). The automatic stay provides a debtor with "an opportunity to protect [his] assets for a period of time so that [his] resources might be marshaled to satisfy outstanding obligations." *Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd. P'ship)*, 30 F.3d 734, 737 (6th Cir. 1994) (citing, among others *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985) ("The purpose of a Chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state.")).

A

BB&T first requests relief under § 362(d)(1), stating that sufficient cause exists to grant relief because the Debtor has failed to provide BB&T with adequate protection payments. The Debtor asserts that BB&T is not entitled to adequate protection payments because the Collateral has not and will not decline in value such as to require him to provide BB&T with periodic cash payments.

A creditor seeking relief from the automatic stay under § 362(d)(1) "bears the burden of producing evidence establishing a legally sufficient basis for such relief[.]" *In re Planned Sys., Inc.*, 78 B.R. 852, 860 (Bankr. E.D. Ohio 1987). In order to obtain relief from the stay for lack of adequate protection, the creditor must establish a *prime facie* case, demonstrating that the debtor owes a debt to the creditor, that the creditor possesses a valid security interest securing the debt, and that the collateral securing the debt is declining in value while the debtor has failed to provide the creditor with adequate protection of its interest in the collateral. *In re Cambridge Woodbridge Apts., L.L.C.*, 292 B.R. 832, 841 (Bankr. N.D. Ohio 2003); *Planned Sys., Inc.*, 78 B.R. at 860. BB&T asserts that as a result of the Debtor's failure to make payments under the promissory notes, its Collateral is not adequately protected.

Adequate protection is addressed in the Bankruptcy Code at 11 U.S.C.A. § 361, which states, in material part:

> When adequate protection is required under section 362 . . . of this title of an interest of an entity in property, such adequate protection may be provided by—
>
> > (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title . . . results in a decrease in the value of such entity's interest in such property;
> >
> > (2) providing to such entity an additional or replacement lien to the extent that such stay . . . results in a decrease in the value of such entity's interest in such property; or
> >
> > (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C.A. § 361 (West 1993).

Adequate protection safeguards a secured creditor's interest in its depreciating collateral during the pendency of the automatic stay. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 108 S. Ct. 626, 630 (1988). Courts must consider "the nature of the creditor's interest in the property, the potential harm to the creditor as a result of the property's decline in value[,] and the method of protection" when making a determination of adequate protection. *In re Plabell Rubber Prods.*, 137 B.R. 897, 900 (Bankr. N.D. Ohio 1992) (quoting *Matter of Braniff Airways, Inc.*, 783 F.2d 1283, 1286 (5th Cir. 1986)). However, "[t]he concept of adequate protection was not designed or intended to place an undersecured or minimally secured creditor in a better post-filing petition [sic] than it was in before the stay." *Planned Sys., Inc.,* 78 B.R. at 862 (quoting *In re Smithfield Estates, Inc.*, 48 B.R. 910, 914-15 (Bankr. D.R.I. 1985)). Because "[a]dequate protection is never necessary unless there is a threat to the value of the encumbrance[, in order t]o determine whether a secured creditor's interest is adequately protected[, courts should consider] (1) the value of the interest; (2) the risk that the value of the encumbrance will decline; and (3) whether the debtor's adequate protection proposal protects value against such risks." *Cambridge Woodbridge Apts.,* 292 B.R. at 841.

Adequate protection is generally accomplished by a debtor providing a creditor with periodic cash payments. 11 U.S.C.A. § 361(1). Adequate protection may also be provided through the granting of a postpetition replacement lien to cover the decrease in the value of the creditor's collateral, 11 U.S.C.A. § 361(2), or by supplying the creditor with a third-party guaranty or new collateral. *Resolution Trust Corp. v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552, 564 (3d Cir. 1994). Additionally, under § 361(3),

the court may fashion other forms of adequate protection, such as requiring the debtor to provide the creditor with proof of an enforceable insurance policy or proof of proper maintenance of the creditor's collateral. *See*, *e.g.*, *In re Republic Techs. Int'l, LLC*, 267 B.R. 548, 554 n.3 (Bankr. N.D. Ohio 2001); *In re Powell*, 223 B.R. 225, 234 (Bankr. N.D. Ala. 1998). Likewise, allowing a creditor to inspect its collateral after making a reasonable request satisfies § 361(3). *See In re 5877 Poplar, L.P.*, 268 B.R. 140, 150 (Bankr. W.D. Tenn. 2001).

In this case, BB&T has not met its burden of proof that it is entitled to adequate protection payments. BB&T stipulated that it is substantially under-secured. Accordingly, in order to be entitled to adequate protection payments, it must evidence to the court that the value of its Collateral is declining in value. It has not done so.

A portion of BB&T's debt is secured by the Topside Road Real Property. However, BB&T offered no credible proof as to the value of this property. The only proof that was offered by BB&T as to the Real Property's value was a typed Collateral Appraisal document, apparently prepared by a bank official at the time the Debtor executed the fourth promissory note. *See* TRIAL EX. 11. Under the collateral description column, this document lists the two lots on Topside Road, valuing the land at $70,000.00 and valuing improvements to the land at $25,000.00. *See* TRIAL EX. 11. However, this document was not verified or signed by any party, nor did it evidence that these values were based upon an appraisal conducted by any qualified appraiser. Instead, the document simply listed, in the court's opinion, estimated appraisal values for all of the Collateral, along with the bank's loan values, the amounts of prior liens on the Collateral, and

BB&T's net value on the August 16, 2001 loan. This document is not credible evidence of the value of any of the Collateral, including that of the Topside Road Real Property.

The only other evidence remotely related to the value of the Topside Road Real Property came from the Debtor, who testified that he erected a shop, consisting of a block building with two overhead doors, and a double-wide trailer on the Topside Road Real Property. However, he was not asked by BB&T if the Real Property had ever been appraised or if he knew its value. And, despite the fact that BB&T provided the testimony of Mr. Franklin, Vice President of Furrow Auction Company in Knoxville, Tennessee, and a qualified appraiser of real property and industrial equipment, to prove the value of the equipment securing the Debtor's promissory notes on location at the Topside Road Real Property, BB&T did not ask Mr. Franklin to conduct an appraisal of the Real Property. As BB&T provided the court with no proof that the Topside Road Real Property is depreciating in value, it is not entitled to adequate protection as to this portion of the Collateral.

In fact, BB&T primarily focused its request for adequate protection payments on the equipment portion of the Collateral. Mr. Franklin testified that he conducted an appraisal of the Debtor's lawn servicing equipment on June 3, 2003, and from that appraisal, he prepared an appraisal report dated June 6, 2003. *See* TRIAL EX. 10. To this report, Mr. Franklin attached a breakdown of the various pieces of equipment appraised, along with his appraised liquidation and fair market values for each piece of equipment. *See* TRIAL EX. 10. Also, the equipment was divided into two categories, that in which BB&T holds a perfected first priority lien (the BB&T Equipment) and the John Deere equipment in which BB&T holds a perfected second priority lien

behind John Deere Credit (the John Deere Equipment). Mr. Franklin summarized that the BB&T Equipment has a fair market value of $17,675.00 and a liquidation value of $13,750.00. He explained that because this equipment is quite old, there is not a great deal of difference in the fair market and liquidation values. Additionally, Mr. Franklin personally met with the Debtor regarding his maintenance, hours of operation, and original purchase dates of the various pieces of equipment. *See* TRIAL EX. 10. As for the John Deere Equipment, Mr. Franklin assigned a fair market value of $59,000.00 and a liquidation value of $40,500.00. He explained that these values were much higher because the John Deere Equipment includes three 2001 models rather than 1997 models, as contained within the BB&T Equipment.[4] With the exception of his valuation for a Walker mower and attachments included in the BB&T Equipment, the Debtor agreed with all of Mr. Franklin's appraisal valuations.[5]

Mr. Franklin also testified that the Debtor's daily use of the BB&T Equipment would not greatly affect its residual value as long as it is adequately maintained, nor could the equipment depreciate a great deal because it is not worth much. Along those lines, Mr. Franklin testified that both the BB&T Equipment and the John Deere Equipment appeared to be well-used and adequately maintained.

The Debtor conceded that all of the lawn servicing equipment and the Ford F150 truck have depreciated in value since he purchased them. However, he also testified that he regularly

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[4] Mr. Franklin did not actually see two of the three John Deere mowers that he appraised, but he contacted a John Deere dealer concerning values of the mowers. *See* TRIAL EX. 10.

[5] Mr. Franklin listed the fair market value of this equipment at $5,000.00, while the Debtor estimated its fair market value at $2,500.00.

maintains the equipment to keep it in good working order, otherwise, he would not be able to conduct his business because he cannot afford to buy new equipment. The Debtor also testified that he has insurance coverage on the equipment, and in support thereof, he submitted a Certificate of Property Insurance. *See* TRIAL EX. 12.[6]

As an initial matter, as to the John Deere Equipment, BB&T is wholly unsecured. Mr. Franklin assigned the John Deere Equipment a fair market value of $59,000.00 and a liquidation value of $40,500.00. Even assuming that the John Deere Equipment could yield the higher fair market value, the $61,000.00 indebtedness to John Deere Credit would not be fully satisfied, and accordingly, BB&T would not receive any proceeds from this portion of the Collateral.

Next, Mr. Franklin assigned a fair market value of $17,675.00 and a liquidation value of $13,750.00 to the BB&T Equipment. The Debtor has insured the BB&T Equipment at a value of $15,000.00, which provides coverage of the equipment's average value, based upon Mr. Franklin's appraisal. Again, presuming that BB&T could realize the full $17,675.00 fair market value of the BB&T Equipment, the court is not concerned with the $2,675.00 difference, which could possibly be the difference in the opinions of Mr. Franklin and the Debtor regarding the value of the Walker mower. Additionally, the Debtor stated, and Mr. Franklin concurred, that the equipment is regularly maintained and cannot depreciate a great deal as long as the maintenance continues. The Debtor also testified that he cannot afford to purchase new

[6] The Debtor was required by the court to submit, as a late-filed exhibit, proof of insurance on the BB&T Collateral. The Certificate of Property Insurance submitted as Trial Exhibit 12 indicates that the Debtor had a valid policy insuring the John Deere Equipment in the amount of $60,000.00, effective from April 1, 2003, to April 1, 2004, and that on July 7, 2003, he added an additional $15,000.00 in coverage to insure the BB&T Equipment. *See* TRIAL EX. 12.

equipment, so if he does not adequately maintain his current equipment, he will be unable to continue his business. While the BB&T Equipment is of a kind that the court would expect to depreciate, even if minimally, there is no proof regarding the rate of any depreciation. The court cannot and will not speculate as to the amount of adequate protection to which BB&T might be entitled on the BB&T Equipment. Accordingly, the court must find that BB&T is adequately protected as to this portion of its Collateral, and relief from the automatic stay pursuant to § 362(d)(1) is not justified.

B

BB&T, asserting that the Debtor does not have any equity in the Collateral and that the Collateral is not necessary for the Debtor's effective reorganization, also seeks relief under 11 U.S.C.A. § 362(d)(2). BB&T bears the burden of establishing that there is no equity in its Collateral, and if it meets this burden, the Debtor must prove the necessity of the Collateral for an effective reorganization. *See* 11 U.S.C.A. § 362(g) (West 1993). However, if BB&T cannot establish the lack of equity, the inquiry ends, and it is not entitled to relief from the stay under § 362(d)(2). *See* 11 U.S.C.A. § 362(d)(2); *Sumitomo Trust & Banking Co. v. Holly's Inc. (In re Holly's Inc.)*, 140 B.R. 643, 697 (Bankr. W.D. Mich. 1992) ("Because § 362(d)(2) is drafted in the conjunctive, both prongs must be satisfied to grant relief from the stay.").

Equity can be defined as "the value, above all secured claims against the property, that can be realized from the sale of the property for the benefit of the unsecured creditors." *Holly's, Inc.*, 140 B.R. at 697 (quoting *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 392 (6th Cir. 1986)).

The parties stipulated that the outstanding balance owed by the Debtor to BB&T is $279,855.13, as of February 11, 2003, and that there is no equity in the Collateral. Accordingly, BB&T has met its burden under § 362(d)(2)(A), so the burden shifts to the Debtor to prove that he cannot effectively reorganize without the equipment, necessitating an analysis under § 362(d)(2)(B).

To satisfy § 362(d)(2)(B), the Debtor must establish that he is attempting to effectuate a successful reorganization, within a reasonable time, and that the Collateral sought by BB&T is necessary therefor. *See Timbers of Inwood Forest Associates*, 108 S. Ct. at 633. The Debtor must provide more than just an assertion that reorganization is not possible without the Collateral. *In re St. Peter's Sch.*, 16 B.R. 404, 408 (Bankr. S.D.N.Y. 1982). At a minimum, the Debtor must make a showing that:

> (1) [He] is moving meaningfully to propose a plan of reorganization. The older or simpler a case or "iffier" the business is, the stronger that showing must be.
>
> (2) The proposed or contemplated plan has a realistic chance of being confirmed . . . and must provide that
>
> > (a) The lender's allowed secured claim can be realistically valued and paid over time . . . from the debtor's net operating income generated by the property; or
> >
> > (b) Some other means of proposing a confirmable plan are realistically contemplated. These may include new capital contributions, sale to a third party or other options sanctioned by the Bankruptcy Code.
>
> (3) The proposed or contemplated plan is not patently unconfirmable[.]

In re Ashgrove Apts. of DeKalb County, Ltd., 121 B.R. 752, 756-57 (Bankr. S.D. Ohio 1990); *see also Creekstone Apts. Assocs., L.P. v. Resolution Trust Corp. (In re Creekstone Apts. Assocs., L.P.)*, 168 B.R. 639, 642 (Bankr. M.D. Tenn. 1994); *In re Snapwoods Apts. of Dekalb County,*

Ltd., 153 B.R. 524, 526 (Bankr. S.D. Ohio 1993). The plan "can be somewhat obscure or vague as long as it is plausible that a successful reorganization may occur." *Holly's Inc.*, 140 B.R. at 701.

The court finds that the Debtor offered satisfactory proof that the Collateral is necessary for his effective reorganization. The Debtor's case was converted from Chapter 13 to Chapter 11 on June 30, 2003, a little more than one week before the evidentiary hearing on BB&T's Motion for Relief. The Debtor's Chapter 11 case is accordingly in its infancy, with the 120-day exclusivity period for filing a plan afforded him under 11 U.S.C.A. § 1121(b) (West 1993) extending through October 28, 2003. The Debtor has been in the lawn servicing business for more than twenty years. His business, LawnLords, has entered into a contract with the State of Tennessee to provide lawn care services to Lakeshore Mental Facility. This contract currently provides him with gross annual revenues approximating $50,000.00. Without his lawn servicing equipment, the Debtor cannot fulfill this or any other contract, and he will lose his ability to earn the income necessary to fund any future plan. Quite clearly, the Debtor cannot effectively reorganize without income, and he has proven, to the court's satisfaction, that he cannot earn income without use of the Collateral. BB&T is not entitled to relief under § 362(d)(2).

An order consistent with this Memorandum will be entered.

FILED: July 14, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-30682

WILLIAM ALEXANDER ANDERSON
d/b/a LAWNLORDS

Debtor

O R D E R

For the reasons stated in the Memorandum on Motion for Relief from Automatic Stay or in the Alternative, Motion for Adequate Protection, the court directs that, to the extent Branch Banking and Trust Company by its Objection to Confirmation of Chapter 13 Plan[,] Motion for Relief from Automatic Stay or in the Alternative, Motion for Adequate Protection and Motion to Dismiss filed April 30, 2003, seeks relief from the automatic stay or adequate protection, its Motion is DENIED.

SO ORDERED.

ENTER: July 14, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE